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MAILED

SEP 07 2010

In re Patent No. 6,276,549	:	OFFICE OF PETITIONS
Issue Date: August 21, 2001	:	
Application No. 09/009,327	:	DECISION ON PETITION
Filed: January 20, 1998	:	UNDER 37 CFR 1.378(b)
For: MODULAR CONTAINER THAT CAN	:	
BE INTERCONNECTED, FOR MULTIPLE	:	
USES	:	

This is a decision on the petition under 37 CFR 1.378(b), filed June 28, 2010, to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f).** The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued August 21, 2001. The second maintenance fee could have been paid from August 21, 2008, through February 21, 2009, or with a surcharge during the period from February 22, 2009 through August 21, 2009. Accordingly, the patent expired August 21, 2009, for failure to timely submit the second maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item requirement (1) set forth above.

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 41(c)(1).

Petitioner herein states:

"The reason of the unavoidable delay of the maintenance fee due to 7½ years (expired 09-21-2009), was because my wife Mirta Mabel Fasci unexpectedly died, leading me to a long and deep depression, forgetting basically any important aspect of life, appointments, chores, and of course, expiration of payments.

We were a team, she was the one who took care of the organization of payments. Now I am trying to do it myself, and I found out of my delayed payment. So I need you to accept he payment of the maintenance fee that expired in the before indicated date (09-21-2009)."

Petitioner seemingly attributes the failure to timely remit the 7.5 year maintenance fee to his personal health following the death of his spouse. The conditions described by patentee, however, are not substantiated by any supporting documentation, such as statements from medical practitioners.

Accordingly, the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

Acceptance of late payment of a maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e. "unavoidable delay". Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications have adopted the "reasonably prudent person" standard in determining if the delay in responding to an Office action was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-515 (D.C. Cir. 1912); and Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141. In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

In essence, petitioner must show that he was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fee came due, was "unavoidably" prevented from making the maintenance fee payment due to his medical problems until the petition was filed.

In determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person. Ray, 55 F3d at 608-609, 34 USPQ2D at 1787. It is incumbent upon the patent owner to implement steps to schedule and pay the fee, or obligate another to do so. See California Medical Products v. Technol. Med. Prod., 921 F.Supp 1219, 1259 (D. Del. 1995). That is, 37 CFR 1.378(b)(3) requires a showing of the steps in place to pay the maintenance fee, and the record currently lacks a showing that any steps were emplaced by petitioner or anyone else. In the absence of a showing that petitioner or anyone else was engaged in tracking the maintenance fee due dates, and that party had in fact been tracking the due dates with a reliable tracking system, such as would be used by prudent and careful men in relation to their most important business, petitioner cannot reasonably show that the delay was unavoidable delay. In re Katrapat, 6 USPQ2d 1863, 1867-1868 (Comm'r Pat. 1988); California, supra. Put otherwise, the issues of petitioner's personal health are immaterial in the absence of a showing that the problems he attributes to personal health, and not the lack of any steps in place to pay the fee, caused or contributed to the delay.

As to the physical condition described by petitioner, petitioner should note that under the circumstances of this case, he will have to provide documents from licensed health care providers, demonstrating the nature and extent of petitioner's incapacitation, in such a manner that petitioner was, from the date of expiry until the filing of the instant petition, "unavoidably" prevented from taking any earlier action with respect to this patent. Additionally, petitioner must state how he managed to conduct his daily personal and business affairs, including scheduling and settlement of short and long term debts and business obligations, bills, rent or mortgage payments, income taxes etc., during the time in question. Petitioner must demonstrate that his physical condition was such as to cause the payment of the maintenance fee to have been unavoidably delayed.

Petitioner should also note that since the maintenance fee was proffered within 24 months of the date of expiration date of the patent, he has an alternate remedy under the unintentional provisions of 37 CFR 1.378(c) which does not require a showing of the delay in timely paying the maintenance fee in order to reinstate the patent. The \$700 surcharge already submitted would be applied to the \$1,640 fee owed under 37 CFR 1.378(c), leaving a balance due of \$940. See, enclosed.

If petitioner elects not to seek reconsideration, petitioner may request a refund of the \$2,880.00 fee submitted herewith. Petitioner may request a refund by writing to the Finance Office, Refund Section. A copy of this decision should accompany any request for refund.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of address should be filed in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record. Petitioner may use the enclosed form to request a change of correspondence address.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
 Commissioner for Patents
 Post Office Box 1450
 Alexandria, VA 22313-1450

By hand: Customer Service Window
 Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

Any questions concerning this matter may be directed to the undersigned at (571) 272-3205.

/ALESIA M. BROWN/

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Petitions Attorney
Office of Petitions

Enc.